

A. L. MacIntosh Company

Excavating & Grading Contractors

9501 Kruse Road

Pico Rivera, CA 90660-1431

(562) 692-1203 · FAX (562) 695-8293

Cal. Lic. No. 193388

Serving Our Valued Customers Since 1952

October 17, 2008

David Dickinson
Compliance and Innovative Strategies Division (6405J)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dickinson.David@EPA.GOV
and a-and-r-docket@epa.gov

Re: California State Nonroad Engine Pollution Control Standards; California Nonroad Compression Ignition Engines – In-Use Fleets; Request for Public Hearing; Docket ID No. EPA-HQ-OAR-2008-0691

Dear Mr. Dickinson:

I am the President of A. L. MacIntosh Company, headquartered in Pico Rivera, California. My company employs approximately 30 full time employees and operates 49 pieces of diesel powered equipment. Our equipment ranges from 25 horsepower to 370 horsepower. Most of our equipment operates fewer than 1000 hours per year in good economic times. Much less in the current economic environment. Our primary business is site grading for schools, hospitals, U. S. Post Offices, shopping centers, and other public works facilities. Because of a lack of available capital and acceptable retrofit devices we will be forced by the regulation to eliminate 28% of our equipment in each of the first years of this regulation resulting in an equivalent reduction in employees. This will be devastating to our survival and to the economy.

On October 7, 2008, the U.S. Environmental Protection Agency (EPA) announced that California had requested a waiver of federal preemption of the state's new emission standards for off-road, in-use diesel engines (73 FR 58585). Our company appreciates the opportunity to provide these written comments on California's request.

If EPA authorizes the nation's first-ever statewide rules on the exhaust from existing fleets of construction equipment, my business and my employees could suffer serious financial harm. California's new standards are enormously complex and certain to cost California's contractors billions of dollars. If EPA grants the waiver, any state may adopt and enforce identical standards, and the already struggling contractors throughout the country would have to bear similar costs.

Pending Proceedings in California

On December 4, 2008, the California Air Resources Board (CARB) announced plans to reconsider several of the issues that its standards raise, in light of significant and unforeseen changes in critical technical, economic and environmental conditions. Shortly thereafter, the Associated General Contractors of America and its two California chapters (collectively "AGC") formally petitioned the state of California to reconsider or repeal its standards. At the outset, my company urges EPA to take no action on California's request for a waiver at least

until CARB completes the review process that it has initiated and decides whether to grant AGC's petition. Until CARB decides whether to make changes, any action taken on its request for a waiver would be premature.

In its petition, AGC included strong evidence that both the economic costs and the environmental benefits of the state's standards are quite different from what the CARB expected at the time it adopted the standards. New technology has been slow to arrive and the available technology has come into conflict with safety standards. Financial markets have frozen and the construction industry now stands on the edge of a sharp decline. Since July of 2007, when the state adopted the rule, the volume of construction work in California has fallen by \$22 billion below the state's economic forecast and the state's construction industry has lost approximately 120,000 jobs. As the construction industry has slowed down, emissions from off-road diesel equipment have also dropped, and the cost effectiveness of the new standards has come into even greater question. Under the totality of the current circumstances, EPA has ample reason to expect CARB to make significant changes in the standards and/or the deadlines for their implementation.

Future Hearings in California

Before acting on California's request for a waiver, EPA should also hold public hearings in both Northern and Southern California. Such hearings are needed to make certain that the state's contractors have a meaningful opportunity to convey their concerns. The rule will force construction companies across the state to retrofit or replace almost all of their heavy construction equipment, raising issues that merit meaningful public discussion and require EPA's most careful consideration. EPA must seek out first-hand experience with the issues that it will have to consider.

To be sure that these hearings focus on the standards that CARB ultimately implements, my company also believes that EPA should set the hearings for dates that *follow* the CARB's reconsideration of its regulation, both on its own initiative and in response to AGC's petition. Any further action on California's request in advance of those developments would be premature.

Standards for Granting a Waiver

Unless and until California makes major changes in its off-road engine emission standards, they will continue to violate the Clean Air Act (Act) and will not qualify for a waiver.

The Act expressly prohibits states from setting standards or other requirements regarding emissions from "new" engines which (1) are used in construction equipment and (2) are less than 175 horsepower (hp). Although California's off-road rule is called an in-use rule, in both substance and effect, it regulates and requires the purchase of new engines and equipment, including those under 175hp, to achieve the rule's average fleet emission limits.

Second, as indicated by the statutory text, California must *need* its standards to address *compelling and extraordinary conditions*. It is not clear that California is unique for diesel emissions. California's particulate matter (PM) nonattainment problem does not differ materially from other arid western states and California's "unique" circumstances do not contribute materially to its PM nonattainment problem.

Third, the Clean Air Act has a "lead time" requirement, providing that California must allow reasonable lead time "to permit the development of technology necessary to meet those requirements." California's rule does not contain adequate lead time to enable compliance. The retrofits are simply not available, and the rule does not provide adequate time for them to become available, before implementation. Although EPA traditionally has looked to technological feasibility and cost *on manufacturers*, EPA's analysis heretofore involved only *manufacturer-based standards*. Here, by contrast, CARB's request requires EPA to consider technology and its cost from a purchaser's perspective.

EPA should also deny California's request for a waiver for at least two other reasons. To the very considerable extent that its standards require contractors to retire equipment before the end of their useful life, it conflicts with the Clean Air Act. In developing the standards, CARB did not adequately and appropriately consider how much it will cost industry to comply.

Regulatory Takings

If EPA grants a waiver, California's standards will force contractors to sell billions of dollars worth of equipment for a fraction of its true value. This would amount to a regulatory taking by the state, and EPA's approval of California's rule would result in a taking by EPA.

Construction companies are thinly capitalized businesses often worth little more than the equipment they own. Our company purchases new machines with the expectation that they will last up to 30 years and with the understanding that they will be legal to operate "as built" until the end of their useful lives. Emissions limits imposed on equipment already in use would render my company's fleet prematurely obsolete, and wipe out much if not most of my company's net worth. Such dramatic action would deprive our company of its ability to bond or bid work, or to borrow money.

I appreciate your consideration of these comments and the opportunity to participate in this critically important proceeding. Thank you.

Sincerely,

Don MacIntosh
President